No. 93-1212

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT GRAVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's decision to grant the government's motion *in limine* was reviewable on appeal.

2. Whether the district court erred in enhancing petitioner's sentence for obstruction of justice under Guidelines § 3C1.1.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1212

ROBERT GRAVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 5 F.3d 1546.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1993. The petition for a writ of certiorari was filed on January 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Louisiana, petitioner was convicted of conspiring to defraud the United

States and the Internal Revenue Service, in violation of 18 U.S.C. 371. The district court sentenced him to 21 months' imprisonment, to be followed by a three-year period of supervised release, and fined him $25,000. The court of appeals affirmed. Pet. App. 1-20.

1. Petitioner was Secretary of the Louisiana Department of Transportation and Development from 1984 until early 1988. During that time, petitioner owned an undivided interest in property located in Pike County, Mississippi. In 1985, petitioner met Joseph Palermo (Joseph), a businessman and member of the Louisiana State Mineral Board, who had been involved in the real estate business in the Lake Charles, Louisiana, area for approximately 18 years. The two men became good friends. Gov't C.A. Br. 7.

In late December 1986, petitioner telephoned Joseph, said that he had tax problems, and asked for help. Petitioner said that he had received certain funds, but did not want to reveal their source to the IRS. Petitioner suggested that property he owned in Mississippi could be used in some way to account for the money. Gov't C.A. Br. 7. Joseph told petitioner that he would think about the problem and get back to him. Because Joseph was on the Mineral Board, he did not want to become directly involved in petitioner's tax problems. Joseph's brother, Myron Palermo (Myron), agreed to help petitioner, however. The three men arranged to meet at Myron's house in early January 1987. *Ibid.*

At the meeting, petitioner and the Palermo brothers agreed to create backdated documents showing that petitioner had sold his interest in the Mississippi property to Myron's company, Three

Sisters Investments, Ltd. Petitioner furnished the dates and amounts of the payments that required documentation. Petitioner also furnished false, backdated receipts showing that between July 1984 and July 1986 Myron had paid $40,000 to petitioner. The three men agreed that false land sale documents would be created to identify Three Sisters Investments, Ltd., as the source of the payments to petitioner. At the end of the meeting, petitioner told Myron that if he ever needed anything, he should contact petitioner. Gov't C.A. Br. 8.

The next day, Joseph went to Myron's office where, in accordance with the agreement, additional documents were created. The documents were sent to petitioner in Baton Rouge, Louisiana, where they were signed by petitioner, witnessed, and notarized. Copies of the completed documents were returned to Myron and filed with his business records. Gov't C.A. Br. 8.

In February 1989, Myron was arrested for attempted distribution of marijuana. At the time of that arrest, law enforcement officers executed a search warrant at his place of business and seized, among other records, the documents created to assist petitioner. After Myron's arrest, he telephoned Joseph and asked Joseph to bail him out of jail. When Joseph secured Myron's release on bond, Myron told him about the seizure of the records related to the false land sale. Joseph relayed that information to petitioner. Joseph and petitioner agreed that petitioner should take some action. Gov't C.A. Br. 9.

Petitioner then traveled to Lake Charles, where he met with Myron. At petitioner's request, Myron wrote a letter to petitioner stating that Myron could

not make the scheduled payments on the Mississippi property, and that as a result Three Sisters Investments, Ltd., was returning the property to petitioner. Petitioner also furnished a quitclaim deed that Myron signed. In March 1989, the deed was filed with the Pike County Clerk of Court. Although no sale had ever occurred, the public record now reflected that petitioner had again become owner of the Pike County property. Gov't C.A. Br. 9.

Early in 1989, Milton Kelly, a certified public accountant, was preparing petitioner's 1988 individual income tax return. Petitioner told Kelly that $40,000 in proceeds from a land sale had been omitted from the return. Kelly used that information in the preparation of petitioner's 1988 return. Gov't C.A. Br. 9-10. In May 1989, while the instant offense was under investigation and after Kelly had testified before the grand jury, petitioner told Joseph what Kelly had told the grand jury about the Mississippi property. Petitioner asked Joseph to pass the story along to Myron so that Myron could tell the same story if questioned about it. *Id.* at 10.

2. Before petitioner's trial, the government filed a motion *in limine* that asked the district court to prohibit the parties from mentioning a paragraph in Myron's plea agreement with the United States Attorney that referred to a polygraph examination. The court offered petitioner an opportunity to place the paragraph before the jury, subject to the conditions that the court would give a cautionary instruction to the jury and that the witness would not be questioned further about polygraphs. Gov't C.A. Br. 3-4. During a pretrial status conference concerning the motion *in limine*, petitioner's counsel asked

to be permitted to introduce the provision referring to a polygraph examination, and that he be permitted to ask questions about polygraphs. The district court ruled that it would bar both sides from referring to the polygraph provision in the plea agreement, and it accordingly permitted the government to introduce a redacted version of the plea agreement. *Id.* at 4.

At trial, petitioner did not object when the government introduced the redacted plea agreement. After the prosecutor read the entire redacted plea agreement to the jury, he asked Myron whether he had "any other agreements with the Western District of [Louisiana]?" Myron said that he did not. Gov't C.A. Br. 26.

After petitioner was convicted, the probation officer recommended that petitioner's sentence be enhanced for obstruction of justice. The basis for the recommendation was petitioner's conversation with Joseph in which he told Joseph what Kelly had said to the grand jury, and then asked Joseph to relay Kelly's story to Myron so that Myron could tell the same story if questioned about it. See Presentence Investigation Report (PSR) ¶¶ 26, 38. Although petitioner objected that the evidence was insufficient to support the enhancement, see Addendum to PSR 5, the district court adopted the PSR's recommendation and found that there was a "sufficient justification" for the obstruction of justice enhancement. Sentencing Tr. 8.

3. The court of appeals affirmed. Pet. App. 1-20. The court assumed *arguendo* that the district court erred in allowing introduction of the redacted plea agreement, and that the district court's offer to admit the unredacted agreement under specified conditions

would not have cured the error. *Id.* at 7-8. It noted, however, that under *United States* v. *Estes*, 994 F.2d 147, 149 (5th Cir. 1993), petitioner's failure to renew his objection to the introduction of the redacted agreement at trial required the court to limit its review to plain error. Pet. App. 8-9. The rationale for requiring a renewed objection, the court observed (*id.* at 10), was to "allow the trial judge to reconsider his in limine ruling with the benefit of having been witness to the unfolding events at trial."[1] The court then found (*id.* at 11-12) that the district court did not commit plain error because (1) the inferences to be drawn from the polygraph clause could have credited as well as impeached Myron's testimony; and (2) the jury had before it abundant other evidence impeaching Myron's credibility.[2]

The court also rejected petitioner's claim that the district court erred in enhancing his Guidelines offense level on the ground of obstruction of justice. The court found that the district court did not commit clear error in making the adjustment. Pet. App. 17-

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[1] The court noted (Pet. App. 10 n.6) that while several circuits applied the same contemporaneous objection requirement that it did, other circuits had acted to "soften the rule." The court also suggested (*id.* at 12) that in another case en banc review of its rule on renewing objections to *in limine* rulings might be appropriate.

[2] Because petitioner did not object to the government's question concerning whether the redacted plea agreement was the "entire" plea agreement with Myron, the court reviewed that question for plain error as well. The court found no plain error, reasoning that any error in permitting the question was not so obvious that the court's failure to notice it would lead to a miscarriage of justice. See Pet. App. 13.

19. The court noted (*id.* at 18-19) that the district court could infer by a preponderance of the evidence that petitioner attempted to suborn perjury, and that petitioner's attempt to "influence" Myron's testimony may have violated the witness tampering statute, 18 U.S.C. 1512(b), though conduct need not violate that statute to satisfy the requirements of Guidelines § 3C1.1.[3]

ARGUMENT

1. Petitioner contends (Pet. 8-16) that the court of appeals erred when it ruled that he did not adequately preserve his objection to the admission of Myron's redacted plea agreement. Petitioner claims that the decision below is based on the faulty premise that rulings on motions *in limine* are tentative and subject to reversal during trial, Pet. 11-13, and that this Court should adopt a uniform rule dispensing with the requirement of an objection during trial to matters that were contested in pretrial proceedings, Pet. 8-11. Those contentions do not warrant review by this Court.

In *Luce* v. *United States*, 469 U.S. 38 (1984), the Court unanimously held that a trial court's *in limine* or preliminary ruling permitting the government to introduce certain evidence to impeach a witness is not reviewable on appeal if the witness does not in fact

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[3] The court of appeals also rejected petitioner's claims that the district court erred in denying his motion to strike language from the indictment (Pet. App. 3-5); in excluding rebuttal evidence that petitioner sought to introduce (*id.* at 5-6); in declining to excuse a juror whose husband was the victim of an assault during trial (*id.* at 14-15); and in failing to give petitioner's proposed jury instruction on the weight to be accorded the testimony of immunized witnesses (*id.* at 15-17).

testify. The Court reasoned that a reviewing court cannot weigh the evidence's probative value against its prejudicial effect without knowing the precise nature of the witness's testimony. *Id.* at 41. The Court also emphasized that an *in limine* ruling "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed, even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling." *Id.* at 41-42. A concurring opinion by Justice Brennan emphasized that *Luce* left open the possibility of appellate review for rulings that turn on purely legal, rather than factual, considerations, since "[t]he appellate court's need to frame the question in a concrete factual context would be less acute, and the calculus of interests correspondingly different." *Id.* at 44.

Consistent with this Court's decision in *Luce*, the courts of appeals have held in a number of contexts that an *in limine* ruling is not reviewable on appeal when the defendant fails to object at trial, and thereby deprives the reviewing court of a specific factual record in which to assess the correctness of the ruling. See, *e.g.*, *McEwen* v. *City of Norman*, 926 F.2d 1539, 1544 (10th Cir. 1991); *United States* v. *Roenigk*, 810 F.2d 809, 815 (8th Cir. 1987); *Hendrix* v. *Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1504 (11th Cir. 1985). As the court of appeals noted (Pet. App. 10 n.6), however, some courts have also "soft-en[ed] the rule" in some contexts. See, *e.g.*, *United States* v. *Mejia-Alarcon*, 995 F.2d 982, 986-988 (10th Cir.), cert.

denied, 114 S. Ct. 334 (1993); *Greger* v. *International Jensen, Inc.*, 820 F.2d 937, 941-942 (8th Cir. 1987); *Palmerin* v. *City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986).

Petitioner errs in suggesting (*e.g.*, Pet. 8-13) that those differing approaches present a conflict requiring this Court's resolution. The cases that have ruled that an *in limine* objection was sufficient to preserve an issue merely recognize, as contemplated by Justice Brennan in *Luce*, that some legal rulings are unlikely to change when the district court is presented with a more concrete factual context, and that appellate review may not be aided by the particular factual context in which those rulings are made. As the Tenth Circuit put it in *Mejia-Alarcon*, an *in limine* ruling "preserve[s] an objection when the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge." *Mejia-Alarcon*, 995 F.2d at 986.[4] That approach does not conflict with a requirement of a trial objection in those cases when a

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[4] Other cases on which petitioner relies do not conflict with the decision below for similar reasons. In *United States* v. *Sides*, 944 F.2d 1554, 1560 (10th Cir.), cert. denied, 112 S. Ct. 604 (1991), the court applied the same rule that the court of appeals applied in the present case. *Sides* therefore does not support petitioner's position. In *United States* v. *Sweiss*, 814 F.2d 1208, 1211 (7th Cir. 1987), there is no indication that the trial court was even presented with a pretrial motion *in limine*. Finally, although the court in *Cook* v. *Hoppin*, 783 F.2d 684 (7th Cir. 1986), did summarily address the issue raised in the petition, its approach is consistent with that taken in *Mejia-Alarcon* and similar cases. See *Cook* v. *Hoppin*, 783 F.2d at 691 n.2.

preliminary ruling, because of a heavy factual component, may be reconsidered as the trial unfolds.

The preliminary ruling challenged by petitioner was sufficiently fact-based and tentative that it would not be reviewable even under the *Mejia-Alarcon* analysis. The district court's ruling offered petitioner an opportunity to introduce the unredacted plea agreement upon certain conditions. Not only was petitioner free to change his mind at trial and accept the court's offer, but the court's decision to admit the evidence on some terms indicates that petitioner was free to argue that the trial record as it actually developed warranted a modification of the conditions. This was not a case, therefore, where it appeared at the outset that the district court had ruled without equivocation on the matter, or that the question was in fact finally decided prior to trial.

Even if the cases cited by petitioner are viewed as conflicting, this case would not be a good vehicle for considering whether a uniform national rule should govern the appealability of *in limine* rulings, because petitioner would derive no benefit from a rule permitting review of his underlying claim.[5] First, as petitioner conceded at oral argument in the court of appeals (see Pet. App. 11-12), the inferences to be drawn from the unredacted plea agreement might have supported Myron's testimony rather than im-

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[5] There is ground for doubting whether national uniformity is needed on the issue. It may be entirely appropriate for the courts of appeals, in the exercise of their supervisory power under Fed. R. App. P. 47, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), to reach varying conclusions as to the desirability of requiring defendants to develop factual records beyond the minimum requirements imposed by Fed. R. Evid. 103.

peached it. Second, and more important, the jury already had before it abundant information that impeached Myron's credibility. The information included Myron's guilty pleas to (1) conspiring to possess 2,000 pounds of marijuana with the intent to distribute it, (2) conspiring to defraud the United States through a money-laundering scheme, and (3) obstructing the United States Customs Service. The jury was also aware that Myron had received substantially lighter sentences for those offenses because of his testimony against petitioner, that Myron had lied to federal authorities about the documents at issue in petitioner's case, and that Myron had a reputation in the community for untruthfulness. See *id.* at 12. In addition, the district court reminded the jury of Myron's reputation for untruthfulness in its instructions. *Ibid.* In light of that impeaching information, the unredacted plea agreement would have been cumulative. The court of appeals thus reasonably concluded (*ibid.*) that "[i]t appears that, even under the normal standard of review, [petitioner] could not show reversible error." That determination does not warrant review by this Court.[6]

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[6] Petitioner likewise errs when he asserts (Pet. 13-16) that he satisfied the requirements of Fed. R. Evid. 103 for appellate review of his claim. No substantial right of petitioner was affected by the court's ruling, because petitioner was not entitled to cross-examine Myron concerning polygraph examinations. Not only was the impeachment value of that line of questioning cumulative, but the kind of polygraph-related information petitioner sought to elicit has generally been held to be inadmissible. See, *e.g.*, *United States* v. *Brown*, 720 F.2d 1059, 1072 (9th Cir. 1983); *United States* v. *Martino*, 648 F.2d 367,

2. Petitioner also contends (Pet. 16-19) that the district court erred in enhancing his sentence for obstruction of justice under Guidelines § 3C1.1. In support of that contention, petitioner claims (Pet. 16-18) that the government failed to present sufficient evidence to show that the testimony he sought to procure was false and material. That challenge to a factual finding in which both lower courts concurred does not warrant review by this Court. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985); *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

In any event, the district court correctly concluded that petitioner's conduct warranted a sentence enhancement under Guidelines § 3C1.1. The entire point of petitioner's conversation with Joseph was to ensure that any testimony by Myron would be consistent with the fraudulent paper trail purporting to document the sale of petitioner's land, and thus to ensure consistency with the grand jury testimony of petitioner's accountant. As the court of appeals correctly noted (Pet. App. 18-19), the district court could therefore permissibly infer from the uncontroverted evidence of petitioner's conversation with Joseph that petitioner was attempting to suborn perjury by Myron or was otherwise impermissibly attempting to influence Myron's testimony. See, *e.g.*, *United States* v. *Armstrong*, 992 F.2d 171, 174 (8th Cir. 1993) (solicitation of false testimony supports enhancement); *United States* v. *Noland*, 960 F.2d

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390 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982); *United States* v. *Bursten*, 560 F.2d 779, 785 (7th Cir. 1977).

1384, 1391 (8th Cir. 1992) (same). See also *United States* v. *Powell*, 973 F.2d 885, 894 (10th Cir. 1992) (attempt to influence witness supports enhancement), cert. denied, 113 S. Ct. 1598 (1993); *United States* v. *Cherif*, 943 F.2d 692, 703 (7th Cir. 1991) (same), cert. denied, 112 S. Ct. 1564 (1992). The court of appeals thus properly concluded (Pet. App. 19) that the district court did not commit clear error in enhancing petitioner's sentence for obstruction of justice.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1994

[7] Petitioner also relies on the commentary to Guidelines § 3C1.1, which provides that "[i]n applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant." Guidelines § 3C1.1, Commentary (Application Note 1). Petitioner's reliance on that provision is misplaced. The basis for the enhancement was not allegedly false testimony or statements by him, but rather his attempt to obstruct or impede the investigation of his case by influencing Myron's testimony.